87-189

Supreme Court, U.S.
FILED
AUG 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

SUPREME COURT OF THE UNITED STATES

TERM: OCTOBER, 1987

CHRISTINE KING and DENNIS P. KING, her husband,

Petitioner,

vs.

DAVID W. CLARE, M.D., an individual, THADDEUS DANOWSKI, M.D., an individual, and SHADYSIDE HOSPITAL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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TARASI, TIERNEY & JOHNSON, P.C.
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Counsel for Petitioner
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Questions Presented

1. Did the Supreme Court of Pennsylvania violate petitioners' right to due process under the 14th Amendment of the United States Constitution when it allowed imposition of an unpublished procedural rule in a civil action?

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OPINIONS BELOW

All the opinions filed in this action are unreported. These include the Order of the Pennsylvania Supreme Court denying permission to appeal, the Order of the Pennsylvania Superior Court denying reargument and the Memorandum Opinions of both the Superior Court and the Allegheny County Court of Common Pleas. These Orders and Opinions are attached to this Petition as Appendix 1.

Jurisdiction

Petitioner seeks to have this Court review a final Order of the Pennsylvania Supreme Court dated and entered May 4, 1987. No request for rehearing of this Order and no extension of time in which to file this Petition have been filed. Jurisdiction is conferred on this Court by 28 U.S.C., Section 1257(3).

CITATION OF RULES INVOLVED

Pa. R.Civ.P. 126 provides:

> "These rules shall be liberally construed to secure the just, speedy, and inexpensive determination of every action or proceeding to which they are applicable. The Court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties."

Pa.R.Civ.P. 227.1(b) provides:

> (b) Post-Trial relief may not be granted unless the grounds therefore,
>
> > (1) if then available, were raised in pre-trial proceedings or by motion, objection, point for charge, request for findings of fact or conclusions of law, offer of proof or other appropriate method at trial; and
> > (2) are specified in the motion. The motion shall state how the grounds were asserted in pre-trial proceedings or at trial. Grounds not specified are deemed waived unless leave is granted upon cause shown to specify additional grounds.

Allegheny County Court of Common Pleas, Civil Division, Rule 212.VI provides in part:

> A. Plaintiff, on or before the date set forth in the notice

accompanying the publication of the trial list; (1) shall serve upon all parties a written statement containing....

* * *

(c) Medical reports of any doctor who treated, examined or was consulted in connection with the injuries complained of, and who may be called as a witness

(d) The reports of any expert whose opinion will be offered in evidence at the time of trial. Such report will include the findings and conclusions of the report.

* * *

C. All other parties shall on or before the date set forth in the notice accompanying the publication of the trial list;

(1) shall serve upon all parties a written statement containing:

(c) Medical reports of any doctor who examined the plaintiff on behalf of any defendant, and medical reports of any other doctor who treated, examined or was consulted in connection with the injuries complained of and who may be called as a witness

(d) The reports of any expert whose opinion will be offered in evidence at the time of trial. Such reports shall include the findings and conclusions of the expert.

Statement of the Case

This Petition arises out of manifestly unfair conduct of a trial by the trial judge and decisions on post-trial motions by the trial and Appellate Courts of such magnitude as to rise the level of due process violations. This action arises out of medical malpractice by Respondent Clare in the treatment of Petitioner Christine King. Mrs. King suffers from hyperthyroidism. Dr. Clare operated on Mrs. King, and as a result of this negligently performed operation, Mrs. King began to experience severe tetany seizures. Her muscles began to spasm; her toes, fingers, hands and knees began to curl. She became unable to move any part of her body except her eyes.

Mrs. King and her husband filed a medical malpractice action against Dr. Clare and others. Pre-Trial Statements

were timely filed by all parties. During the course of the trial, the Court excluded much testimony by Plaintiffs' medical expert, on the basis that it was not adequately set forth in the Pre-Trial report required by Local Rule 212. On the other hand, the Court allowed Defendants to use testimony from a surprise expert witness who had not been disclosed in Defendant's Pre-Trial Statements or at any earlier point in discovery.

Plaintiffs raised other objections to the Court's conduct at the trial: the Court's mischaracterization of evidence in comments to the jury, disparaging remarks about counsel in the presence of the jury and refusal to give various jury charges. Thereafter, the jury found for the Defendant, Dr. Clare. Plaintiff timely filed post-trial motions which the Court

held were so inadequate as to preclude any post trial relief.

That the admission of Defendant's expert testimony at trial was error so obvious as to defy argument. The Superior Court in its Opinion did not rule on the merits of these questions. The dissent of Justice Del Sole criticized the majority's avoidance of these questions. The reason for the Superior Court's not wanting to grant a new trial is made clear by the discussion below. The comments by the Trial Court about a decision substantively on the merits refers to the procedural preclusion of a substantive issue which of course is substantive in itself. It is the Trial and Appellate Court's rulings on purported defects in these post trial motions that gives rise to this Petition.

PRESERVATION OF FEDERAL ISSUES

The matter complained of could not have been raised in the Trial Court since it involved the manner of its final disposition of the case. The fundamental unfairness of the Trial Court's decision was argued extensively in the briefs below. As explained to the Superior Court in Petitioners' (then Appellants') Brief, Defendants below did not even raise the procedural objections which became the basis of the Court's decision, "Defendants did not object to the arguments raised in Plaintiffs Motions or Brief." Petitioners' (then Appellants) Brief to Pennsylvania Superior Court at 17. In Petitioners' Petition for Allowance of Appeal to the Supreme Court of Pennsylvania, Petitioners said, "To sustain the Trial Court's decision, as two members of the Superior Court panel have done would elevate

[Pa.R.Civ.P.] Rule 227.1 to such an extent as to deny due process to the Appellants." Petition for Allowance of Appeal at 13.

Reasons for Granting the Writ

The Trial Court and the Pennsylvania Appellate Courts effectively and without notice or publication introduced a rule that post-trial motions and briefs must contain specific references to page numbers in order to adequately preserve grounds for appeal. This doctrine no where appears in the Pennsylvania Rules of Civil Procedure. The trial court freely acknowledges that a transcript of proceedings will not usually be available when post-trial motions are due. Op. at A50. The Court then states "[T]here is no question that the appealling party can file an Amended Motion to comply with Rule 227.1 after the transcript of notes of testimony has been filed." Id. at A51. This Amended Motion Provision is no where in the rules, and as the Court itself notes (if its view that page number references must be in-

cluded in post-trial motions is correct), the rule cannot ordinarily be complied with. Accordingly, it is unconstitutionally unfair.

The adequacy of a state procedural ground for denying review is a federal question. See Henry v. Mississippi, supra, 379 US at 447, 85 S Ct at 567 (1965); Staba v. City of Backsley, 355 US 313, 318, 78 S Ct 277, 280 2 L Ed 302 (1958). The test is whether the state's insistence on compliance with its procedural rule serves a legitimate state interest. Henry v. Mississippi, supra, 379 US at 447, 85 S Ct and 567. See also, Wainwright v. Sykes, supra, 433 US at 83 note 8, 97 S Ct at 2504 n. 8. Indiscriminate application of the procedural bar is also generally required, in addition to examining the interests served by procedural default rule, and the relative inflexability of

its application. See, e.g., NAACP v. Alabama, 377 US 288, 301, 84 S Ct 1302, 1310, 12 L Ed 2d 325, (1964); Williams v. Georgia, 349 US 375, 383, 75 S Ct 814, 819 99 L Ed 116 (1955). In the instant case, this Court may consider whether retroactive imposition of such a rule to bar consideration of a constitutional right should be accorded deference by this Court.

This Court has held on a number of occasions that the consideration of asserted Constitutional Rights may not be thwarted by the simple recitation that there has not been observance of a procedural rule with which there has been compliance in both substance and form in every real sense. NAACP v. Alabama, 377 US 288, 84 S Ct 1302, 12 L Ed 325 (1964); Barr v. Columbia, 378 US 146, 84 S Ct 1734, 12 L

Ed 766; Staba v. Backsley, 355 US 313, 78 S Ct 277, 2 L Ed 302, 1958.

Even where state procedural requirements are not strictly or regularly followed, this Court has said that it will not be deprived of the right to review. Parrot v. Talahasse, 381 US 129, 85 S Ct 1322, 14 L Ed 263 (1965); Sullivan v. Little Hunting Park, Inc., 396 US 229, 90 S Ct 400, 24 L Ed 386 (1969). In this instance, not only does this Court have the right to review the denial of Petitioners' due process rights during the trial of its civil action it has the duty to do so.

In the instant case, the trial court below fashioned a novel procedural requirement for the first time in the instant case which was affirmed by the Superior Court of Pennsylvania and not reviewed by the Supreme Court of Pennsylvania which had the effect of

precluding review by any State Court of the denial of Petitioners' 14th Amendment due process rights under the Constitution of the United States.

The Supreme Court of the United States is the Court of last resort to which these Petitioners can appeal for redress of their wrongs. Petitioners respectfully request that this Honorable Court grant this Petition for Certiorari so that they may be protected in their rights and they may have what is guaranteed to them by the Constitution of the United States, a fair trial on the merits and not be deprived of their rights by the actions of the Trial Court below.

CONCLUSION

For these various reasons, Petitioners pray this Honorable Court grant this Petition for Certiorari to the Supreme Court of Pennsylvania and so issue the writ.

Respectfully submitted,

TARASI, TIERNEY & JOHNSON, P.C.

By S/John T. Tierney, III
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510 THIRD AVENUE
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(412) 391-7135
Counsel for Petitioners

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1. The actions of the Trial Court may be viewed as an effort by the Court to enforce its decisions on the settlement of cases. As this Court, is well aware, trial judges play an increasingly active role in settling cases. Such a rule is necessitated by the need to process cases through the system. For example, in the last year the inventory of cases in the Allegheny County Court of Common Pleas grew 29.1%. This is a problem of national dimensions. However great the need to settle cases,

decisions at trial and on appeal cannot be influenced by this need. When cases go to trial, litigants are entitled to fair trials uninfluenced by judicial intervention in settlement discussions. Litigants do not have a civil right (under the Federal Constitution) to appeal, but having granted such a right the cases ought to be heard and decided on a legitimate basis.

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

May 4, 1987

Louis M. Tarasi, Jr., Esquire
John T. Tierney, III, Esquire
510 Third Avenue
Pittsburgh, PA 15219

In Re: Christine King, et al. v. David W. Clare, M.D., et al.
No. 282 W.D. Allocatur Docket 1986

Gentlemen:

The Court has entered the following Order on your Petition for Allowance of Appeal in the above matter:

"May 4, 1987
Petition denied
Per Curiam"

Very truly yours,

S/Irma T. Gardner

DEPUTY PROTHONOTARY

ITG:cs
cc: Robert S. Grigsby, Esquire
Michael Kearney, Esquire
Hon. Silvestri Silvestri

THE SUPERIOR COURT OF PENNSYLVANIA
SITTING AT PITTSBURGH

April 28, 1986

John T. Tierney, III, Esquire
510 Third Avenue
Pittsburgh, PA 15219

IN RE: CHRISTINE KING AND DENNIS P. KING, HER HUSBAND VS. DAVID W. CLARE, MD, AN INDIVIDUAL, ET AL. NO. 321 PITTSBURGH, 1985

Dear Mr. Tierney:

The Court has entered the following Order on your Application for Reargument in the above-captioned matter:

ORDER OF COURT

AND NOW, this 28th day of April, 1986, Appellant's Application for Reargument is denied.

PER CURIAM

Very truly yours,

S/Eleanor R. Valecko

DEPUTY PROTHONOTARY

ERV:kde

cc: Robert S. Grigsby, Esquire
Michael J. Kearney, Jr., Esquire

J-77001/85

CHRISTINE KING and DENNIS P. KING, HER HUSBAND, Appellants	)	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	)	
DAVID W. CLARE, M.D., AN INDIVIDUAL, THADDEOUS DANOWSKI, M.D., AN INDIVIDUAL, AND SHADYSIDE HOSPITAL	)	No. 321 Pittsburgh, 1985

Appeal from the Judgment in the Court of Common Pleas of Allegheny County, Civil Division, No. GD 82-12064

Before: ROWLEY, DEL SOLE and TAMILIA, JJ.

PER CURIAM FILED: MARCH 7, 1986

Judgment affirmed.

Judge Del Sole files a Concurring and Dissenting Memorandum.

J-77001/85

CHRISTINE KING and DENNIS P. KING, HER HUSBAND, Appellants	)	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	)	
DAVID W. CLARE, M.D. AN INDIVIDUAL, THADDEOUS DANOWSKI, M.D., AN INDIVIDUAL, AND SHADYSIDE HOSPITAL	)	No. 321 Pittsburgh, 1985

Appeal from the Judgment in the Court of Common Pleas of Allegheny County, Civil Division, No. GD 82-12064

Before: ROWLEY, DEL SOLE and TAMILIA, JJ.

MEMORANDUM:

This is an appeal from judgment denying appellants' motions to remove nonsuits in favor of Shadyside Hospital and Dr. Thaddeous Danowski and denying a motion for new trial and/or judgment n.o.v. as to Dr. David Clare. We affirm this decision.

This action commenced when appellants brought suit against Dr. Danowski, Dr.

Clare and Shadyside Hospital as a result of treatment provided and surgery performed upon Mrs. Christine King. Drs. Danowski and Clare were both alleged to have been negligent in their treatment and care of Mrs. King and to have acted without her informed consent. Shadyside Hospital was alleged to be negligent individually and to be responsible for the actions of Dr. Clare under the theory of respondent superior. Mr. King brought a claim of loss of consortium against each of the defendants.

At the close of plaintiff's evidence the trial court granted a motion for nonsuit on behalf of Dr. Danowski. In doing so, it found there was no evidence to establish liability against him under the theory of informed consent, the only theory advanced during trial.

A motion for nonsuit on behalf of Shadyside Hospital was also granted; the court finding no evidence to support the establishment of an agency relationship. The case was submitted to the jury only on the claim of lack of informed consent against Dr. Clare and a verdict was returned in his favor.

Appellants filed three separate papers as post-trial motions. One titled "Motion to Remove Nonsuit" applied to Shadyside Hospital; a second similarly titled applied to Dr. Danowski and a third titled "Amended Motion for New Trial and/or Judgment Notwithstanding the Verdict" applied to Dr. Clare. The trial court finding these motions to fail procedurally and substantively denied all three. This appeal followed.

The first issue raised on appeal is the trial court's finding that the post-trial motions were procedurally deficient to such a degree that no issues were preserved for review.

Appellants argue that although the motions did not conform to Pa.R.C.P. 227.1 as to form, they are in tune with the spirit of the rule. Additionally, it is urged that under Pa.R.C.P. 126 the rules of civil procedure should be liberally construed.

Appellants note that although the "Motions to Remove Non-suit" were in general language a discussion took place before the court entered the non-suits at which time appellants made clear their theories of recovery. Additionally, these reasons were outlined in the brief in support of motion for new trial and to

remove non-suit. Appellants assert that because a trial transcript was not available at the time post-trial motions were filed they were not able to point out where specific objections were made nor passages in testimony detailing their theory of recovery against Drs. Danowski and Clare. They contend that the motion for new trial and/or judgment n.o.v. did sufficiently apprise the court and opposing counsel of the errors objected to at trial.

After a complete review of the record, we agree with the trial court's assessment of the inadequacies of appellants' post-trial motions. Initially we note the dissatisfaction this court has expressed in boilerplate motions such as those presented in the "Motions to Remove Non Suit"; Cherry v. Miller, _____ Pa.

Super. _____, 463 A.2d 1082 (1983). In addition, "only issues specifically raised in post-verdict motions can be considered and will be preserved for appeal, and issues raised only in briefs in support of those motions may not be considered." Id. at ____, 463 A.2d at 1084.

We find this to be a case of not only mislabeling the motions under the Rules of Procedure but also a failure to meet the substantive requirements necessary to enable the court to know with specificity the errors being asserted, how they were preserved for review and the grounds upon which the moving party is relying. Although Pa.R.C.P. 126 is cited by appellants in support of liberal interpretation of the rules, we would look also to Pa.R.C.P. 127(b) which states:

> (b) Every rule shall be construed, if possible to give effect to all its provisions. When the words of a rule are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.

The "Motion for New Trial and/or Judgment Notwithstanding the Verdict" was procedurally deficient although 21 numbered paragraphs of reasons for relief were set forth. Under rule 227.1(d) and the explanatory comment applicable, whenever alternative relief is sought separate reasons should be stated for each type of relief sought. This was not done and the trial court correctly noted; "It is neither our function to analyze each reason to determine which applies to each motion and they dispose of each motion nor will we do so..." Opinion, Silvestri J. Court of Common Pleas of Allegheny County, filed February 19, 1985 GD 82-12064 at 13.

Finally, in denying this initial argument we note that appellants' brief has failed to cite any case law in support of any of their arguments why the lower court acted improperly. The other issues raised by appellants are also without merit. Those raised concerning the granting of the non suits were not preserved because the motions were boilerplate in nature. Cherry v. Miller, supra; Carnicelli v. Bartram, _____ Pa. Super. _____, 433 A.2d 828 (1981). The questions of court error in allowing certain testimony, excising other testimony, refusing points for charge and making prejudicial statements were all dealt with by the trial court. We find the analysis of the court to be correct as to these issues and affirm on the basis of that opinion.

Judgement affirmed.

Judge Del Sole files a Concurring and Dissenting Memorandum.

J. 77001/85

CHRISTINE KING AND DENNIS P. KING, HER HUSBAND	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
APPELLANTS	:	
v.	:	
DAVID W. CLARE, M.D., AN INDIVIDUAL, THADDEOUS DANOWSKI, M.D., AN INDIVIDUAL, AND SHADYSIDE HOSPITAL	:	NO. 321 PITTSBURGH 1985

Appeal from the Judgment in the Court of Common Pleas of Allegheny County, Civil Division, No. GD 82-12064.

BEFORE: ROWLEY, DEL SOLE AND TAMILIA, JJ.

CONCURRING AND DISSENTING MEMORANDUM BY DEL SOLE, J.:

I join the majority in its analysis that the motion to remove the nonsuits entered in favor of Dr. Thaddeous Danowski, M.D., and Shadyside Hospital are totally inadequate and do not conform to Pa.R.C.P.

227.1 as to form or substance. Therefore, I agree that those issues have not been properly preserved for appeal and would affirm the decision of the trial court in refusing to remove the nonsuits.

I differ with the majority, however, in its procedural attempt to deal with motions for judgment not withstanding the verdict and/or new trial.

Admittedly, the motion does not separate the claimed relief into categories. However, as I view the pleadings filed, while the motion and the amended motion are titled "Motion for New and/or Judgment Notwithstanding a Verdict", the certification of counsel attached thereto with regard to service refers to the pleading as being a motion for new trial. Therefore, I would dismiss the motion for judgment notwithstanding the verdict as having not been properly preserved and

would treat the remaining motion as a motion for a new trial.

My review of that motion leaves me to conclude that it is procedurally sufficient to raise various issues of alleged error at the time of trial and I would reach those issues on the merits.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CHRISTINE KING and DENNIS P. KING, individuals, plaintiffs,	CIVIL DIVISION No. GD82-12064 Issue No.
v.	
	Code
DAVID W. CLARE, M.D. and individual, THADDEUS DANOWSKI, an individual, and SHADYSIDE HOSPITAL, Defendants.	OPINION AND ORDER

O P I N I O N

SILVESTRI, J.

Plaintiffs, Christine L. King and Dennis P. King, filed a six count complaint in trespass for injuries sustained by Christine. Christine had sought medical treatment for a thyroid condition from defendant Dr. Danowski, an endocrinologist. Danowski referred her to Dr. Clare, a surgeon, who performed a thyroidectomy. The surgery was performed at Shadyside Hospital, and plaintiff, it is alleged, has suffered complications and sustained damages as a result thereof. There is a single count by Christine against each of the physician defendants, Danowski and Clare, for lack of informed consent and negligence in the treatment and care of Christine; there is a count against Shadyside Hospital for its own negligence and for the negligence of the physician

defendants. There are single counts by Dennis against each of the defendants for "Loss of Consortium."

During the trial of the case, counsel for the plaintiffs proceeded only on the claim of lack of informed consent as to defendant Dr. Danowski. (Tr. 226, 227; Tr. 433, 434; Tr. 464)

The plaintiffs' claims against Danowski and Shadyside were nonsuited [1] and the case was submitted to the jury only on the

(1) We were not unaware that the grant of a nonsuit in favor of one defendant where there are multiple defendants, as here, and also where damage testimony has been elicited is not normally the appropriate procedure. However, on the representation of Clare and Shadyside that they had no evidence to inculpate Danowski, and on the representation of Danowski that he had no evidence to inculpate Shadyside, and further, on all defendants representation that regardless of how the court ruled, the parties in their cases in chief would present no evidence to inculpate Danowski and Shadyside, we considered and granted the nonsuits as to Danowski and Shadyside. See Mazza v. Mattiace, 284 Pa.Super. 273, 425 A.2d 809 (1981).

claim against David W. Clare and only on the claim of lack of informed consent. The jury returned a verdict in favor of Clare.

The plaintiffs timely filed three separate papers, one entitled "Motion to Remove Nonsuit" applied only to Shadyside, another entitled "Motion to Remove Nonsuit' applied only to Danowski,[2] and another entitled "Amended Motion for New Trial And/Or Judgment Notwithstanding the Verdict"[3] applied only to Clare.

(2) Danowski filed a Motion to Strike Plaintiffs' Motion to Remove Nonsuit to which plaintiffs filed a response. The parties were ordered to brief and argue Danowski's Motion to Strike at the same time as the scheduled argument on plaintiffs' three motions. Danowski failed to brief or argue his Motion to Strike, thus waiving and abandoning the same. Schneider v. Albert Einstein Med. Ctr., 257 Pa. Super. 348, 390 A.2d 1271 (1978).

(3) The amended motion was filed the same day as the original motion and except for corrections not herein significant, is identical to the original motion.

For the reasons hereinafter set forth, we deny plaintiffs' motions since, both procedurally and substantively, they have failed to preserve any issues for our review.

This lawsuit was tried in May of 1984. The Supreme Court on October 19, 1983 adopted Pa. R.C.P. 227.1, effective January 1, 1984. At the time this case was tried, the nonsuits entered, and the verdict of the jury returned, Rule 227.1 was in effect and and applicable to the within case.

Rule 227.1, entitled Post-Trial Relief, as herein relevant, in subdivision (a) provides:

> (a) After trial and upon written Motion for Post-Trial Relief filed by any party, the court may
>
> (1) order a new trial as to all or any of the issues; or
>
> (2) direct the entry of judgment in favor of any party; or

(3) remove a nonsuit; or

* * * *

The Explanatory Comment to subdivision (a) states:

The amendments [Rule 227.1] abolish the distinctions which have existed heretofore in post-trial practice. A party who seeks post-trial relief will do so by filing a Motion for Post-Trial Relief irrespective of whether the action is at law or in equity or whether the action is tried with or without a jury. . . .

* * * *

Rule 227.1 is entirely new. It includes several subjects not previously covered by the Rules of Civil Procedure.

Subdivision (a) authorizes the court to grant post-trial relief upon motion. The rule specifies the relief which may be granted and does not alter the prior practice.

Subdivision (a) prescribes the filing of a "written Motion for Post-Trial Relief". Motions for New Trial, for Judgment Notwithstanding the Verdict and for Judgment Upon the Whole Record will no longer be filed following a trial by jury. ... The relief heretofore available through these motions and exceptions remains available through the new Motion for Post-Trial Relief.

Rule 227.1, as herein relevant in subdivision (b) provides:

(b) Post Trial relief may not be granted unless the grounds therefor,

(1) if then available, were raised ... by objection, point for charge ... offer of proof or other appropriate method at trail;

(2) are specified in the motion. The motion shall state how the grounds were asserted ... at trial.

* * * *

The Explanatory Comment to subdivision (b) states:

Subdivision (b) states two requirements for the granting of post-trial relief. First, the grounds for relief requested must have been raised in pre-trial proceedings or at trial and, second, they must be stated in the motion.

Subdivision (b) (1) incorporates into the rule the principle of Dilliplaine v. Lehigh Valley Trust Co., 457 Pa. 235, 322 A.2d 114 (1974, that basic and fundamental error is not a ground for a new trial in the absence of a timely objection at the trial. The rule extends the principle to all post-trial relief. A ground for a new trial or a judgment notwithstanding

the verdict may not be raised for the first time in the Motion for Post-Trial Relief. It must be raised timely in pre-trial proceedings or during the trial, thus affording the court the opportunity to correct the error.

* * * *

Subdivision (b) (2) specifies the requisites of the motion for post-trial relief. It must state the specific grounds for the relief sought and "how the grounds were asserted in pre-trial proceedings or at trial."

In requiring the motion to state the specific grounds therefor, motions which set forth mere "boilerplate" language are specifically disapproved. A post-trial motion must set forth the theories in support thereof "so that the lower court will know what it is being asked to decide," Frank v. Peckrich, 257 Pa. Super. 561, 391 A.2d 624, 632-633 (1978).

The requirements that the motion state how the grounds were raised at trial indicates compliance with the requirements of Dilliplaine, supra, and subdivision (b) (1) that there be a timely objection in pre-trial proceedings or at the trial.

Subdivision (c) of Rule 227.1 continues the practice of permitting a party to request post-trial relief in the alternative. When a party elects to so proceed, separate reasons should be set forth in support of each type of relief requested. Again, the document should make the trial judge aware of each request for relief and the grounds in support thereof.

Pa. R.C.P. 227.1, except as to form, is not a change from prior law. Rule 227.1 succinctly restates the law relating to preservation of issues for appeal. Dilli-plaine v. Lehigh Valley Trust Co., 457 Pa. 255, 322 A.2d 114 (1974), in discarding the "basic and fundamental error" doctrine and requiring timely and specific objection be taken at trial, alerted the trial bar to the necessity for professional representation during trial.

That the appellate courts are committed to the Dilliplaine requirement of issue preservation is demonstrated by its progeny: Tronzo v. Flohr Chevrolet, Inc., 231 Pa. Super. 455, 331 A.2d 555 (1974) (no allegation of error will be considered unless it was properly raised by specific objection at time of trial); Williams v. Pepsi-Cola Metro. Bottling Co., Inc., 240 Pa. Super. 578, 362 A.2d 314 (1976) (issue raised for the first time on appeal will not be considered); Siter v. Maryland Peat & Humus Co., 242 Pa. Super. 184, 363 A.2d 1221 (1976) (objection at trial for specific reason, other reasons are waived and may not be considered); Young Antics, Inc. v. Jaymar Realty Corp.; 245 Pa. Super. 244, 369 A.2d 385 (1976) (post-trial motions must set forth reasons assigned with such clarity that both the court and adverse party may be informed of

the import of such reasons and given sufficient opportunity to meet them, otherwise they will not be considered); Schneider v. Albert Einstein Med. Ctr., 257 Pa. Super. 348, 390 A.2d 1271 (1978) (failure to brief and argue post-trial motions waives the right to appeal; and failure to include alleged error in post-trial motions constitutes waiver thereof); Tagnani v. Lew, 493 pa. 371, 426 A.2d 595 (1981) (where relief could be requested of the trial court for alleged error and none requested, the issue is waived); Carnicelli v. Bartram, 289 Pa. 424, 433 A.2d 878 (1981) ("boilerplate" motions, such as "the verdict was against the law" or "the verdict was against the evidence" are not sufficient because counsel's precise statement of issues and grounds relied upon in written form is necessary to insure that both the trial court and

adverse parties will have adequate notice of the legal theories being advanced); Stulz v. Boswell, 307 Pa. Super. 515, 453 A.2d 1006 (1982) (error assigned on appeal on a different ground than that asserted at trial will not be considered); Cherry v. Willer, _____Pa. Super. _____, 473 A.2d 1082 (1983) (only errors specifically raised in post verdict motions can be considered and will be preserved for appeal and issues raised only in briefs in support of those motions may not be considered); Wicker v. Civil Service Com'n., 74 Pa. Cmwlth. 548, 460 A.2d 407 (1983) (defects in briefs which greatly impair the ability to conduct meaningful review precludes consideration of the merits); Kemp v. Qualls, _____Pa. Super. _____, 473 A.2d 1369 (1984) (different theory on appeal than the one asserted at trial will not be considered).

It is readily apparent that, from Dilliplaine to the present, it has been affirmed and reaffirmed that not only must there be timely and specific objection and/or request for relief at the time the alleged error was committed, but in addition the same must be specifically set forth in the post-trial motion, must be briefed and/or argued, and the brief must be such as to permit a meaningful review of the merits of the right to the relief sought. Thus, Rule 227.1 is merely a restatement of the law relating to preservation of issues in post-trial motions.

While there may be instances where the post-trial motion may not be labeled as required by Rule 227.1, there is no reason for noncompliance with the substantive requirements of 227.1. Such requirements have been the law for a long time prior to January 1, 1984, the effective date of

Rule 227.1, and any competent counsel engaged in the trial of cases should not only be aware of, but should be thoroughly familiar with, those requirements.

The plaintiffs filed three motions subsequent to trial as hereinabove set forth. It is obvious that the motions, as to form, are in contravention of Rule 227.1 If this were the only error of said motions, other than footnoting noncompliance, we would overlook it and proceed to the merits notwithstanding our difficulty in comprehending how and why such errors of form should or could occur if counsel, as required, stays abreast of the rules of procedure.

The two motions filed by plaintiffs which seek to have the nonsuits removed, with the exception of the names of defendants, are identical and merely state that "...Plaintiffs ... move this ...

Court to remove the Non-Suit ... for the reason that said Non-Suit was improperly entered and that there was sufficient evidence for Plaintiffs to submit their case ... to the jury."

That the request to remove the nonsuits in favor of Danowski and Shadyside is not in compliance with Rule 227.1(b) is clear.

There is nothing in plaintiffs' nonsuits to indicate whether they joined in or opposed the grant of the nonsuits, or whether they objected to the entry of the same, or the grounds that they asserted in the trial court in opposition to the nonsuit, or how the grounds, if any, were asserted before the trial court.

The statement in plaintiffs' motion to remove the nonsuits "... said Non-Suit was improperly entered and that there was sufficient evidence ... so submit this case ... to the jury ..." is the kind of

"boilerplate" condemned in Carnicelli v. Bartram, supra, and specifically disapproved in the explanatory comments to subdivision (b) (2) of Rule 227.1, supra.

Neither this court nor opposing counsel is given any notice by the plaintiffs' "Motion to Remove Nonsuit" of what evidence, if any, was produced to warrant submission of the claim against Danowski and Shadyside Hospital to the jury.

The plaintiffs, as they failed to specify the grounds in their "Motion to Remove Nonsuit", likewise failed to do so in their brief. The plaintiffs' argument in support of their motion to remove the nonsuit in favor of Shadyside Hospital is Argument V, which appears at pages 20, 21, 22 and 23 of their filed brief.

The plaintiffs' brief neither refers to any page in the notes of testimony where there is evidence in the record to support

agency, express or apparent, nor does it quote any evidence to support their claim of agency. The plaintiffs' brief merely cites principles of law, but no facts in the record to which the cited legal principles apply.

It is the function of counsel, not the court, to review the notes of testimony and to set forth the evidence therein to support their contentions. Only in this manner can there be a meaningful review of the issues properly raised. For this court and opposing counsel to address the plaintiffs' "Motion to Remove Nonsuit" they would have to review the record of plaintiffs' case to determine whether or not there was evidence to submit the claim against Shadyside Hospital to the jury. This the court will not do, nor do we expect or require opposing counsel to do so.

Counsel for the plaintiffs during the trial stated on the record that the only claim being asserted against Danowski was based on lack of informed consent as follows:

> The COURT: ... As I understand, your claim is, as far as Dr. Danowski is concerned, lack of informed consent.
>
> MR. TIERNEY: Well in addition, Your Honor, as far as Dr. Clare is concerned.
>
> THE COURT: I said Dr. Danowski.
>
> MR. TIERNEY: Okay.
>
> THE COURT: That's all, isn't it?
>
> MR. TIERNEY: That's correct.
>
> [T. 226, 227]

* * * *

> THE COURT: Yes, but to save time, I understand what he is attempting to do, as to Dr. Danowski, lack of informed consent. As to Dr. Clare, lack of informed consent and malpractice in performing the surgery.
>
> [T. 424]

The plaintiffs' argument in support of the "Motion to Remove Nonsuit" in favor of Danowski in Argument VI appears at pages 23, 24, 25, 26 and 27 of their filed brief. Except for the last three paragraphs of the plaintiffs' brief, they argue that the nonsuit should be removed because "Section 323 of the Restatement 2d of Torts envision a cause of action for negligent performance of undertaking to render services ...." (Plaintiffs' Brief, page 24) and "It is Plaintiffs' contention that in undertaking to treat Mrs. King, Dr. Danowski accepted responsibility to provide Mrs. King with the safest care possible." (Plaintiffs' Brief, page 26) and, "In the present case, the Court did not allow the issue as to whether the Defendant's acts or omissions increased the risk of harm to another to reach the finder of fact." (Plaintiffs' Brief, page 26)

None of the foregoing theories were advanced at trial nor raised in the "Motion to Remove Nonsuit"; further, as hereinabove set forth, the claim asserted against Danowski was predicated on the doctrine of lack of informed consent only.

As to the lack of informed consent claim against Danowski, there is no dispute that Danowski, an endocrinologist, treated Christine medically for her thyroid condition, it is also undisputed that Danowski is not a surgeon and has never practiced surgery; it is also undisputed that Danowski referred Christine to Clare who was a practicing surgeon; it is also undisputed that Clare performed the surgery on Christine about which she now complains.

The plaintiffs, in their brief relating to the lack of informed consent claim against Danowski, argue in the last three

paragraphs of Argument VI (page 27) as follows:

> "Dr. Danowski's failure to properly advise Plaintiff of the risk of surgery also was actionable on the theory of informed consent. The Court's theory for granting the non-suit is that the informed consent theory applies only to be (sic) he who holds the scalpel.
>
> "Such a restricted view of the doctrine, especially in the circumstances presented here is totally at odds with reason, and justice, and quite understandably is not supported by Pennsylvania case law.
>
> "As there are important issues of fact to be resolved by the jury concerning Defendant, Dr. Danowski, the Plaintiff requests the Court to remove the nonsuit granted in Defendant, Dr. Danowski's favor."

The plaintiffs assert that the trial court's restricted view ... is not supported by Pennsylvania case law" but fail to inform this court or opposing counsel of the nonsupportive case law. It is difficult for this court to comprehend how one can assert what the case law is in a brief without citation to the case(s).

The plaintiffs also state "... there are important issues of fact to be resolved by the jury concerning ... Dr. Danowski ..." without edifying either the court or opposing counsel of the "important issues of fact."

Plaintiffs not wishing to reveal their secret of what the "Pennsylvania case law" and "important issues of fact" are, their wish of secrecy will be respected by our refusal to research the law for the "Pennsylvania case law" and comb the notes of testimony to unveil the "important issues of fact", nor will we ask or require opposing counsel to do so.

The plaintiffs filed a paper entitled "Amended Motion For New Trial And/Or Judgment Notwithstanding the Verdict." This paper, as entitled, is not in compliance with Rule 227.1 as to form. The explanatory comment to the rule states:

> "Subdivision (a) prescribes the filing of a 'written Motion for Post-Trial Relief.' Motion for New Trial, for Judgment Notwithstanding the Verdict, and ... will no longer be filed following a trial by jury .... The relief heretofore available through these motions ... remains available through the new Motion for Post-Trial Relief."

The paper filed by the plaintiffs asks for both a new trial and for judgment n.o.v. in the same document. Prior to the adoption of Rule 227.1, it was necessary to file two separate motions or, if combined in one document, the two were to be separated. See Act of April 22, 1905, P.L. 286 and Pa. R.C.P. 226.

Under Rule 227.1, the prior practice is continued as set forth in the explanatory comment as follows:

> "Subdivision (d) continues the practice of permitting a party to request post-trial relief in the alternative. When a party elects to so proceed, separate reasons should be set forth in support of each type of relief requested. Again, the document should make the trial judge aware of each

request for relief and the grounds in support thereof.

The plaintiffs set forth twenty-one separately numbered paragraphs of reasons for relief in their "Amended Motion." The first twenty paragraphs each set forth a single reason for relief whereas paragraph twenty-one contains subparagraphs (A) through (J), each of which sets forth a single reason; thus, there are thirty reasons set forth by plaintiffs for the requested relief.(4)

The thirty reasons are not separated to demonstrate which are in support of the

(4) The plaintiffs improperly "shotgunned" their reasons by listing separately as reasons four through seventeen the fourteen points for charge they submitted at trial. Two of the reasons, being eleven and twelve, relate to damages. Plaintiffs' counsel should know that where there is no liability, the question of damages becomes irrelevant and any alleged errors relating to damages are moot. Kirby v. Carlisle, 178 Pa. Super. 275, 116 A.2d 220 (1955).

Motion for a New Trial and which are in support of the Motion for Judgment N.O.V.

It is neither our function to analyze each reason to determine which applies to each motion and then dispose of each motion nor will we do so or require opposing counsel to do so.

Substantively, plaintiffs, in disregard of Rule 227.1 and prior case law, have failed to set forth in their New Trial/Judgment N.O.V. motion, not only the grounds for several of the reasons set forth, but also have not stated how any of the grounds were asserted at trail.

Reasons 1, 2 and 3 of Plaintiffs' Motion are "boilerplate", which are not only prohibited by prior case law, Carnicelli v. Bartram, supra, but specifically mentioned as being disapproved in the commentary to Rule 227.1.

The plaintiffs filed fourteen written points for charge, all of which the trial court refused. The plaintiffs in their Motion, in paragraphs four through seventeen, prefaced each paragraph with "The Court erred in failing to charge the jury as requested by the Plaintiff in the following manner: ...", followed by a verbatim restatement of each of the fourteen written points for charge and nothing more. The plaintiffs do not specify in their Motion the grounds which made the court's refusal of the requested points for charge error, or whether any or all the grounds were preserved by way of exceptions to the refusal of the trial court to so charge, or what charge was given which was improper.

The plaintiffs' argument relative to reasons four through seventeen of their Motion appears as Argument II in their

brief. Except for what the plaintiffs refer to as the "doctrine of res ipsa loquiter", the plaintiffs in their brief merely state as to points for charge, being reasons four through eight and eleven through seventeen of their motion (one through five and eight through fourteen of their filed request for points for charge), that each request was in accordance with a specific case, giving only the name and citation, without explanation of how the cited cases applied to the case at bar. The plaintiffs made no effort to demonstrate in what manner the charge, as given by the trial court, was in error, why the requested charge should have been given instead of the charge as given, or the facts which merited the requested charge and not the charge as given.

As to plaintiffs' res ipsa loquitur argument (reasons nine and ten of plaintiffs' motion--six and seven of plaintiffs' request for points for charge), the plaintiffs assert, "On the basis of the facts appearing on the record Plaintiff maintains that this is a proper case for the application of the doctrine of res ipsa loquitur." While the plaintiffs cite a number of cases for the doctrine, they neither set forth the facts of the cited cases nor the facts of the case at bar to demonstrate that the doctrine should be herein applicable.

Additionally, while plaintiffs' brief alludes to their informing the court of their reasons for requesting a res ipsa loquitur charge, and their objecting to the court's refusal to do so, the plaintiffs do not set forth any facts in their brief from the record or refer to

pages in the record where such facts may be found. Further, plaintiffs allude to a portion of Dr. Skillern's deposition testimony as a basis for a res ipsa loquitur charge, however, the plaintiffs overlook the fact that that portion of Dr. Skillern's deposition testimony was excluded from evidence.

The plaintiffs argue in Argument IV of their brief that certain statements made by the court in the presence of the jury were prejudicial. In this section of plaintiffs' brief there is listed that the court refused to give Christine time to compose herself when she began to cry. This was not raised in plaintiffs' New Trial/Judgment N.O.V. Motion and will not be considered. The plaintiffs failed to brief reason twenty-one J and it will not be considered either. Schneider v. Albert Einstein Med. Ctr., supra.

Under this argument, the plaintiffs merely list the reasons set forth in twenty-one A through I of their New Trial/ Judgment N.O.V. Motion. It is to be noted that plaintiffs list ten reasons of which seven relate either to admission or exclusion of evidence, the charge of the court, permissible argument by counsel, and rulings by the court. It is also noteworthy that neither in plaintiffs' New Trial/Judgment N.O.V. Motion nor in their brief have they set forth how the foregoing matters were asserted at trial, how preserved and the grounds therefor.

Reasons nineteen and twenty of plaintiffs' New Trial/Judgment N.O.V. Motion were not briefed and are deemed waived. Schneider v. Albert Einstein Med. Ctr., supra.

The plaintiffs in reason eighteen of their Motion state that the court erred in

excluding most of the direct testimony of Dr. Skillern while allowing defendants to introduce testimony of medical experts without filing a report as required by Rule 212. What one has to do with the other, the plaintiffs do not say.

Again plaintiffs do not set forth what testimony of Dr. Skillern was excluded, how it was raised and the grounds of error, nor do they set forth the circumstances why defendants should be precluded from presenting expert witnesses without filing a report.

The plaintiffs, in their brief in Argument I, allude to both the exclusion part of Dr. Skillern's testimony and allowing Dr. Trellis to testify without showing any relationship of one to the other. Additionally, in Argument III, plaintiffs again address allowing Dr. Trellis to

testify without the benefit of filing a report.

As to Dr. Trellis testifying, the plaintiffs overlook the fact that Dr. Trellis, as a consulting physician, saw, examined, and recommended treatment of Christine while she was a patient in Shadyside Hospital, all of which the plaintiffs were aware. The plaintiffs failed to set forth what Dr. Trellis' testimony was and how they were prejudiced.

As to excluding a part of Dr. Skillern's testimony, the plaintiffs have not set forth what was excluded or the reasons therefor, or the effect, if any, of excluding the unrevealed portion of Dr. Skillern's testimony.

Dilliplaine v. Lehigh Valley Trust Co., supra, in discarding the basic and fundamental error doctrine, observed that the

doctrine removed the professional necessity for trial counsel to be prepared to litigate the case fully at trial and to create a record adequate for appellate review and that there is no excuse for, and appellate courts should not encourage, less than alert professional representation at trial. The Supreme Court concluded, inter alia, "This doctrine, which may in the past have been acceptable, has become an impediment to the efficient administration of our judicial system."

In Tagnani v. Lew, 493 Pa. 371, 426 A.2d 595 (1981), after noting the commitment of the Supreme Court to Dilliplaine by the consistency of its progeny in adherence to the rules of issue preservation both on trial and appellate levels, Justice Nix, now Chief Justice, speaking for the Court, observed that " ... it has become imperative that the former paternalistic

approach be discarded and a high degree of professionalism be insisted upon ... To maximize our efficiency and to maintain and enhance the quality of our dispute resolution process, strict compliance with the procedures for issue preservation is essential."

The necessity for the preservation of issues during trial means that counsel must not only be prepared as to all facets of the case he/she is trying, but must also be continually alert as to what is transpiring in the courtroom in order to ensure that any matters which he/she perceives as error are properly preserved.

It is understandable that, by reason of the nature of a trial, there are times that trial counsel may fail to properly preserve an issue. Our research has failed to uncover a single case wherein the appellate courts have considered an issue

which has not been properly preserved at trial no matter the reason for failure to do so.

Issue preservation, as above noted, is not limited to the trial of the case, but also to pre-trial and post-trial proceedings. If issue preservation and professionalism during trial when counsel is confronted with the many pressures of the trial, is demanded upon penalty of the issue not being considered, it seems that no excuse for failure to preserve issues and professionalism can or should be tolerated in post-trial proceedings.

The party who is not pleased with the result of the trial is not under immediate pressure to file post-trial proceedings since ten days time is given by the rule to file for post-trial relief. The rule also provides that the moving party may file additional grounds upon cause shown.

Since, in the normal course of events, the notes of testimony are not available within the ten days to file for post-trial relief, there is no question that the appealing party can file an amended motion to comply with Rule 227.1, after the transcript of the notes of testimony has been filed.

The point is, there is not the pressure in the pursuit of post-trial motions as there is during the trial of a case. While it may be understandable that counsel may fail to preserve an issue during trial, there is not reason why counsel should fail post-trial to preserve an issue or issues. It would also appear that since the Pennsylvania Rules of Civil Procedure are published in book form, are readily accessible and cover specific proceedings, there is no reason why counsel should not resort to the Rules when undertaking a

proceeding to ascertain if the proceeding is covered by the Rules and, if so, what is required. It is apparent that counsel for the plaintiffs did not resort to the "rule book" in this case.

Preservation of issues not only applies to trial and post-trial motions, but also to briefs in support of post-trial motions. Whatever reason there may be for failure to preserve issues at or in post-trial motions, there is no valid reason for non-preservation of issues in a brief. Non-preservation of issues in a brief may result in two ways, i.e., (1) failure to brief an issue properly preserved at trial and also properly preserved in the post-trial motion, and (2) filing a brief which does not permit meaningful review.

If there is a point in time in handling a matter for a client which demands professionalism, it is in the briefing of the

issue or issues for the court. This is the point where the court and the adversary are to be clearly and unequivocally apprised of the facts, the legal issues and direction counsel wants the court to take in the disposition of the matter appealed. The brief should be self-sustaining and not require the court to go beyond the brief for the relevant facts and the relevant law. Likewise, the appellate rules relating to briefs, Pa. R.A.P. 2111 through 2139, set forth what a brief should contain in order to allow for meaningful review.

Plaintiffs' counsel, in reason sixteen of the New Trial/Judgment N.O.V. Motion asserts that the trial court erred in failing to instruct the jury that Dr. Clare would be negligent if he failed to keep abreast of the improvements of the day in medical skills and knowledge and if

he failed to inform himself of those advances.(5)

It is ironic that we should be asked to declare a professional in another field negligent for failure to stay abreast of advances in his/her field and at the same time condone the failure of the professional in our field to do the same things

(15) We note, as we observed above, that reason sixteen of plaintiffs' motion for New Trial/Judgment N.O.V. is a verbatim repetition of point for charge number thirteen. Plaintiffs' point for charge, however, is not even a complete, grammatically correct sentence. In preparing the Motion for New Trial/Judgment N.O.V., counsel for plaintiffs not only failed to take the time to adequately prepare both the procedural and the substantive aspects of the motion but in addition did not even bother to read and correct it in order to ascertain that the motion was written in proper English. Nor did plaintiffs' counsel check that same point in filing the Amended Motion for New Trial/Judgment N.O.V. Such careless work is representative of plaintiffs' counsel's entire post-trial preparation.

in the very proceeding seeking to establish the professional negligence of the other.

In the case of Commonwealth v. Stoppie, No. 3277 and 3278 Philadelphia 1982, 1597 Philadelphia 1983, Superior Court (Slip Opinion filed December 21, 1964), the Court observed:

> " ... We note a trend in which appellate counsel ignore our appellate rules concerning the preparation of briefs."

The Superior Court noted that one of counsel's egregious errors was found in his noncompliance with Pa. R.A.P. 2116 which deals with the statement of questions involved. The Superior Court observed: "Counsel was not intimidated by this rule...." In the case at bar, counsel was neither intimidated by Rule 227.1 nor Dilliplaine and its progeny.

If we do not enforce Rule 227.1, or Dilliplaine or its progeny and particularly in regard to the adequacy of briefs, which is an extension of Dilliplaine, and, instead conduct a search of the record in an attempt to discover if the grounds for the post-trial relief were raised at trial, what the grounds were, and how the grounds were asserted, and, if, having found the same, then search the record for facts and research the law to support the counsel's request for post-trial relief, then to quote an often used expression, "Who needs lawyers?"

As the Superior Court stated in Commonweath v. Sanford, 299 Pa. Super. 64, 445 A.2d 149 (1982);

> "We decline to become appellant's counsel. When issues are not properly raised and developed in briefs, when the briefs are wholly inadequate to present specific issues for review, a court will not consider the merits thereof."

See also A. M. Skier Agency, Inc. v. Pocono Futures, Inc., 308 Pa. Super. 481, 454 A.2d 637 (1982).

The judges of the trial courts are not law clerks to the attorneys who appear in cases before them. It is the function of counsel to professionally and adequately present their client's cause, not only consistent with the procedural rules, but also the substantive law consistent with the facts of the case; and, in their representation of a client, counsel is charged with knowledge of the then existing procedural and the then existing substantive law.

Plaintiffs' counsel's blatant disregard of Rule 227.1 cannot be countenanced. If Rule 227.1 was a completely new concept and a radical departure from the past, it could be argued that noncompliance, at least once, may be excusable. However,

Rule 227.1 is neither new nor a departure from case law. Rule 227.1 encompasses the case law of Dilliplaine which was decided in 1974 and its progency which dealt with issue preservation not only during trial but in post-trial motions and in briefs.

If there is concern for the client who may suffer from counsel's deficiency in issue preservation, we close with the words of Justice Mandarino in his concurring opinion in Dilliplaine:

> "I join in the opinion by Mr. Justice Roberts holding that the rule of basic and fundamental error is a rule without specific standards and should be abolished. The abolition of the rule, I should like to add, does not leave an aggrieved party without a remedy.
>
> "Issues not raised in the trial court because of ineffective assistance of counsel may be reviewable on appeal in a criminal case. Commonwealth ex rel. Washington v. Maroney, 427 Pa. 599, 235 A.2d 349 (1967), sets forth specific standards which are applicable in determining whether counsel was effective in a criminal case.

"An aggrieved party in a civil case, involving only private litigants unlike a defendant in a criminal case, does not have a constitutional right to the effective assistance of counsel. The remedy in a civil case, in which chosen counsel is negligent, is an action for malpractice."(6)

(6) We are neither deciding nor suggesting that there are grounds for an action for legal malpractice in this case. As a matter of fact, we have read the notes of testimony and find that even if there had been compliance with Rule 227.1, Dilli-plaine and its progeny, there is no merit in any of the plaintiffs' alleged claims of error.

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

CHRISTINE KING and DENNIS P. KING, Individuals, Plaintiffs,	**CIVIL DIVISION**
	No. GD82-12064
	Issue No.

v.

DAVID W. CLARE, M.C., an individual, THADDEUS DANOWSKI, an individual, and SHADYSIDE HOSPITAL, Defendants

O R D E R

SILVESTRI, J.

AND NOT, this 19 day of February, 1985 it is hereby ORDERED as follows:

1. Plaintiffs' Motion To Remove Nonsuit in favor of Shadyside Hospital is denied.

2. Plaintiffs' Motion to Remove Nonsuit in favor of Thaddeus Danowski is denied.

Supreme Court, U.S.
FILED
SEP 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-189

In the Supreme Court of the United States

October Term, 1987

CHRISTINE KING and DENNIS P. KING,
her husband,
Petitioner,
vs.
DAVID W. CLARE, M.D., an individual,
THADDEUS DANOWSKI, M.D., an individual,
and SHADYSIDE HOSPITAL,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA FILED ON BEHALF OF RESPONDENTS DAVID W. CLARE, M.D. AND THADDEUS DANOWSKI, M.D.

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Thaddeus Danowski, M.D.

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STATEMENT OF THE CASE

In July, 1982, petitioners ("the Kings" or "the Petitioners") filed a medical malpractice lawsuit against respondents, David W. Clare, M.D. ("Dr. Clare"), Thaddeus Danowski, M.D. ("Dr. Danowski"), and Shadyside Hospital.

At the trial of the Kings' action, the trial court granted a motion for nonsuit on behalf of Dr. Danowski and Shadyside Hospital. The case was submitted to the jury as to Dr. Clare only. A verdict was returned in his favor.

The Kings filed three post-trial pleadings—a "Motion to Remove Nonsuit" as to Shadyside Hospital; a "Motion to Remove Nonsuit" as to Dr. Danowski; and an "Amended Motion for New Trial and/or Judgment Notwithstanding the Verdict" as to Dr. Clare. These pleadings were briefed and argued before the trial court.

On February 15, 1985, the trial court issued an Opinion and Order which denied all three Motions. (Kings' Petition for Writ of Certiorari at A16). Although the trial court's opinion was devoted mainly to a discussion of the Kings' noncompliance with Pa. R.Civ.P. 227.1, the trial court concluded that the Kings' post-trial motions failed procedurally and substantively to preserve issues for review. Judgment was entered on February 27, 1985.

The Kings are complaining only of the trial court's application of Pa. R.Civ.P. 227.1, not the substantive decision of the trial court. Rule 227.1 was adopted by the Supreme Court of Pennsylvania on October 19, 1983 and was made effective on January 1, 1984. This suit was tried in May, 1984, so the Rule was clearly applicable to any post-trial motion filed in this case. Rule 227.1 requires that the movant state the grounds which support the granting

of the relief requested and state how those grounds were asserted at trial. The Explanatory Comments to Rule 227.1 also codify prior Pennsylvania case law as to disapproval of the use of "boilerplate" language in post-trial motions and as to the requirement that theories in support of the motions be set forth explicitly. The trial court's opinion described in detail the manner in which the Kings' motions for post-trial relief fell short of the standards required by Rule 227.1.

The Kings appealed the trial court's February 15, 1985 decision to the Pennsylvania Superior Court. Briefs on appeal were submitted and oral argument was held before the Honorable James E. Rowley, the Honorable Joseph A. Del Sole and the Honorable Patrick R. Tamilia. The only question presented in the Kings' Brief was "Whether the Lower Court erred in refusing to grant Plaintiff's Motions to Remove Nonsuit and Motion for New Trial and/or Judgment Notwithstanding the Verdict." One of the issues raised and argued on appeal was whether the trial court erred when it found the Kings' post-trial motions so deficient that no issues were preserved for review.

On March 7, 1986, the Superior Court issued a Per Curiam Order which affirmed the judgment below. (Petition at A3). The Superior Court held that a complete review of the record led to the conclusion that under applicable law, the trial court's decision to deny the Kings' post-trial motion for failure to preserve issues for review was correct. Judge Del Sole concurred and dissented from the majority opinion. Judge Del Sole joined the majority in its evaluation of the "Motion[s] To Remove Nonsuits," but differed with the majority by concluding that the

"Amended Motion for New Trial and/or Judgment Notwithstanding the Verdict" was sufficient to raise and preserve issues of alleged error. No mention of the constitutional claim which the Kings are now asserting was made in either the majority or the dissenting opinion.

On March 21, 1986, the Kings filed the Application for Reargument and/or Reargument *En Banc*, which was denied by Order of the Superior Court on April 28, 1986. (Petition at A2).

On May 28, 1986, the Kings filed a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania. The only question presented in the Kings' Petition for Allowance of Appeal was "Whether Petitioners Motion for New Trial is procedurally and substantively sufficient as required by Pennsylvania Rule of Civil Procedure 227.1." This petition was denied by Order of the Supreme Court of Pennsylvania on May 4, 1987. (Petition at A1).

On August 3, 1987, the Kings filed the Petition for a Writ of Certiorari ("Petition") which is presently before this Court, and for the first time in any stage of these proceedings allege that they were denied due process of law under the United States Constitution.

SUMMARY OF ARGUMENT

The Petitioners cannot assert that this Court has jurisdiction over the federal constitutional question presented because they failed to raise the question at any point during the proceedings below.

This Court should not exercise its discretion in favor of granting a writ of certiorari because the Petitioners failed to set forth any "special or important reasons" why this Court should review this case, and because no such

reasons exist in light of the proceedings below and prior precedent of this Court.

ARGUMENT

I. According To This Court's Own Decisions, The Petitioners' Failure To Raise, At Any Point During The State Court Proceedings, The Federal Constitutional Question Now Presented Deprives This Court Of Jurisdiction Over The Question.

According to its own decisions, this Court lacks the jurisdiction to decide the federal constitutional question presented by the Petitioners because the question was not raised at any time during the state court proceedings below. The decisions cited by the Petitioners, Petition at 7-9, discuss the question of whether the existence of adequate state grounds for a state court decision can prevent this Court from considering a properly asserted constitutional claim. Those decisions are inapplicable to the facts of this case because Pa. R.Civ.P. 227.1 was not used to foreclose consideration of the Petitioners' constitutional claim, but was used instead to dismiss their post-trial claims which were based on state law.

"The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1162, 1163, 22 L.Ed.2d 398, 400 (1969). The constitutionality of the trial court's application of Rule 227.1 was not raised as an issue at any time during the proceedings below, so the Petitioners cannot now assert the constitutional claim in order to obtain review by this Court.

Petitioners claim that this Court has jurisdiction pursuant to 28 U.S.C. §1257(3), but they have failed to set forth the manner in which the constitutional claim was properly asserted in the state courts.[1] (Petition at iv). Application of §1257(3) "requires that in the state courts petitioner have 'specially set up or claimed under the Constitution . . . of . . . the United States' that right which [they] now seek to have this Court enforce." *Webb v. Webb*, 451 U.S. 493, 495, 101 S.Ct. 1889, 1891, 68 L.E.2d 392, 396 (1981). Petitioners are correct in asserting that it was impossible to assert the constitutional claim during the trial court proceedings because the alleged due process violation occurred in the manner in which the trial court rendered its final decision (Petition at 4). The Petitioners, however, failed to raise the federal question in the state appellate courts as required by prior decisions of this Court. In their attempt to comply with Rule 21.1(h)[2] of Rules of the Supreme Court of the United States, the Petitioners can only cite to *one sentence* in their Petition for Allowance of Appeal to the *Supreme Court* of Pennsylvania (as opposed to the Superior Court, where the issue should have been raised originally) in which the words "due process" are mentioned. This singular use of the phrase "due process" is not an acceptable way of raising and preserving a constitutional issue in the state courts under this Court's decision in *Webb*.

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[1]When the state appellate courts fail to pass upon a federal question, as is the case here, "it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582, 89 S.Ct. 1354, 1360, 22 L.E.2d 572, ___ (1969).

[2]The pertinent portion of that Rule requires that the Petitioner specify in his statement of the case the stage in the proceedings below at which the federal question was raised.

The facts of the instant case are analogous to those of *Webb*. In *Webb*, this Court held that it lacked jurisdiction to decide the constitutional question presented, even though the petitioner had used the phrase "full faith and credit" several times during the proceedings below. This Court noted that the petitioner had failed to cite to the Federal Constitution or to any case relying on the Full Faith and Credit Clause of the Federal Constitution. *Webb*, 451 U.S. at 496, 101 S.Ct. at 1891, 68 L.E.2d at 396. This Court also noted that the federal question at issue was not mentioned anywhere in the majority opinion or in the dissenting opinion of the state supreme court. The Petitioners in the instant case likewise failed to raise the constitutional claim at any point during the proceedings below and now allege that the federal question was raised by the rhetorical use of the phrase "due process" in their petition to the Pennsylvania Supreme Court. Since the constitutional issue was never raised in the Superior Court, neither the majority opinion nor the dissenting opinion mentioned it. This Court's decision in *Webb* dictates that jurisdiction over the question presented in the Petition is lacking.

The cases cited by the Petitioners, Petition at 7-9, are inapplicable to the jurisdictional issue in this case. Those cases involved situations where it was argued that this Court did not have jurisdiction over a federal constitutional claim which had been asserted in the state court because the state court decision had been based on adequate state procedural grounds. This Court decided in those cases that the state procedural rule at issue had been applied in a novel or inconsistent manner and that the unique application of a state procedural rule would not deprive this Court of jurisdiction over a constitutional claim. *See, e.g., N.A.A.C.P. v. Alabama*, 377 U.S. 288, 84

S.Ct. 1302, 12 L.E.2d 325 (1964). This proposition is inapplicable to the instant case because Rule 227.1 was not applied to foreclose consideration of the Petitioners' federal constitutional claim.[3] Rather, Rule 227.1 was used to dismiss the Petitioners' post-trial motions for relief which were based on *state law* grounds, not constitutional grounds, and the Rule was applied in a manner consistent with the relevant Pennsylvania precedent. *See King v. Clare,* No. 321 (Pa. Super. 1985) (Petition at A3). The Superior Court did not apply Rule 227.1 to foreclose assertion of either a federal constitutional claim or the state law procedural claim. The Superior Court did, in fact, decide the state law procedural claim against the Petitioners, and it was the Petitioners' own failure to raise their constitutional claim in the Superior Court that caused that court to decide *only* the state law procedural claim.

In order for the cases cited by the Petitioners to be applicable to the instant case, the Petitioners first would have had to assert their constitutional claim in Superior Court. The Superior Court or the Supreme Court of Pennsylvania then would have had to deny relief by application of a procedural rule, perhaps Pa. R.App.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."). The state court would also had to have applied the state procedural rule in a manner which was novel or inconsistent with past Pennsylvania precedent. This, however, is not the situtation in the instant case, so the cases cited by the Petitioners are irrelevant.

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[3]As stated above, the federal constitutional claim was never raised in the state court proceedings.

This Court should deny the Petition because of the Petitioners' failure to raise the constitutional claim at any point during the state court proceedings below.

II. No "Special And Important Reasons" For This Court To Review This Case Were Alleged In The Petition, Nor Do Any Reasons For Review Exist.

The Petitioners failed to set forth in their Petition any reason why this Court should review this case. The Petitioners assert that this Court's jurisdiction can be based on 28 U.S.C. §1257(3), and have filed their Petition to that effect. The considerations which govern whether an appeal will be allowed by this Court on a writ of certiorari are set forth in Rule 17 of the Rules of the Supreme Court of the United States. Rule 17 explicitly states that the review which the Petitioners seek is a matter of this Court's discretion, not a matter of right. Review will be granted "only when there are special and important reasons therefor." Rule 17 also contains indications of the character of the reasons that the Court will consider in making the decision as to whether to grant review. Those considerations include:

> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court. Sup. Ct. R. 17.

The Petitioners have not set forth a single case with which the Superior Court's decision is in conflict, nor have the Petitioners set forth any "special or important reasons" which would justify the exercise of this Court's discretion in favor of granting the writ of certiorari.

The Petitioners do cite to several cases in the Petition, but they are irrelevant to the issue of whether this Court *should* review this case. As noted above, each of the cases cited by the Petitioners stands for the proposition that review by this Court of a constitutional right which was properly asserted during the state court proceedings cannot be barred on the theory that the state court decision rests on "adequate state grounds" when those grounds are based on the novel or inconsistent application of a state procedural rule. This proposition is relevant only to the question of whether this Court *can* review this case, and is not at all relevant to the question of whether this Court *should* review this case.

Not only did the Petitioners fail to set forth any reasons why this Court should grant discretionary review of this case, but they also are unable to do so. The decisions of both the Superior Court and the trial court are in accord with the applicable precedent of this Court. "[T]he State certainly accords *due* process where it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." *Thomas v. Arn*, ____ U.S. ____, ____ 106 S. Ct. 466, 475, 88 L.E.2d 435, 448 (1985); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437, 102 S.Ct. 1148, 1158, 71 L.Ed.2d 265, 279 (1982). Due process requires only that litigants be granted an *opportunity* for a meaningful hearing appropriate to the nature of the case. *Id.* The Petitioners had the opportunity to assert their constitutional claim in the argument to the Superior Court or in

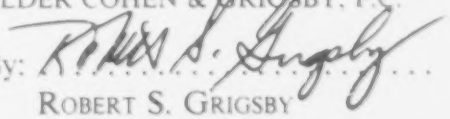
their petition to the Supreme Court of Pennsylvania, but failed to do so. They also cannot claim that they never had an opportunity to argue that the trial court erred on the state law procedural issue because the Superior Court decided that very question in favor of the Respondents after full briefing and oral argument. There is nothing in the Petition which reflects a departure from sound judicial proceedings, and accordingly, the Petitioners can cite to no "special and important reasons" why this Court should exercise its discretion to grant review of this case.

CONCLUSION

For the foregoing reasons, the Respondents respectfully request that the Kings' Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

CHRISTINE KING, et al.
v.
DAVID W. CLARE, M.D., et al.

No. 87-189
Term: October, 1987

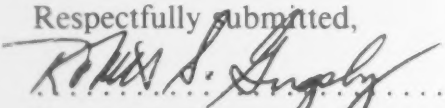
CERTIFICATE OF SERVICE

I hereby certify that a copy of the brief in opposition to the petition for certiorari filed in the above action was served upon counsel of record for all parties in this action by depositing a copy of said brief in the United States mail, first-class, postage prepaid, addressed as follows:

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